UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

In the Matter of: RAILSERVE, INC., Respondent Employer, and UNITED STEELWORKERS OF AMERICA, LOCAL 10-1, Charging Party Union,	Case No. 04-CA-161485

EMPLOYER'S POST-HEARING BRIEF

Respectfully submitted,

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I. STATEMENT OF THE CASE

This is a dispute between Railserve, Inc. ("Railserve" or "Employer") and United Steelworkers of America, Local 10-1 ("Steelworkers" or "Union"). The dispute is based upon Railserve's withdrawal of recognition from the Union, in November 2015, after it received a petition signed by a majority of the unit employees. (Stip. Facts ¶¶67-68, Jx-58). While all signatures were obtained after the certification year had run, and were never rescinded, (Id., and Stip. Facts, ¶3, Jx-2), Counsel for General Counsel ("CGC") contends Railserve's withdrawal of recognition was unlawful. (Complaint, ¶¶7-8). CGC is wrong. This Complaint should be dismissed in its entirety. At a minimum, the wishes of a majority of the unit, that the Steelworkers no longer represent, should be honored.

The Union did, essentially, enjoy an irrebuttable presumption of majority status during the certification year. Hartz Mountain Corp., 295 NLRB 418, 426 (1989). However, the certification year began August 28, 2014 (Jx-2) and, thus, ended August 28, 2015. (Id.). Once the certification year had run, the presumption of majority status became rebuttable and Railserve was privileged to withdraw recognition upon receipt of objective evidence that the Union had lost majority support. Levitz Furniture Co. of Pacific, Inc., 333 NLRB 717, 724 (2001). A petition signed by a majority of unit employees requesting withdrawal of recognition establishes that a union has lost majority support. Id., Shaw's Supermarkets, Inc., 350 NLRB 585, 587-88 (2007); Matthews Readymix, Inc. v. NLRB, 165 F.3d 74, 77 (D.C. Cir. 1999). Railserve received a petition signed by 60% of the unit (19 out of 31) on November 20, 2015, requesting that Railserve withdraw recognition. (Stip. Facts, ¶67). It did so that same day. (Id., ¶68).

"This evidence of employee disaffection privileged [Railserve's] withdrawal of recognition if no legal barrier precludes reliance on it." Lexus of Concord, Inc., 343 NLRB 851, 852 (2004). As discussed below, "no legal barrier" precludes Railserve's reliance on the petition (Jx-58) signed by a majority of the unit's employees after the certification year had run. (Stip. Facts, ¶67). This is true even if Railserve committed the only other ULP alleged in the Complaint (a purported failure to bargain with "reasonable frequency"). Garden Ridge Management, Inc., 347 NLRB 131, 134 (2006). See also, LTD Ceramics, Inc., 341 NLRB 86, 88 (2004) ("In sum, the single [proven] unfair labor practice at issue here did not taint the petition"); Matthews Readymix, 165 F.3d at 78-79 (unlawful inquiry into union sentiments on application does not taint petition).

Thus, as stated, the certification year had run when the signatures were obtained and the withdrawal of recognition occurred. (Stip. Facts, ¶¶3, 67-68). There was no collective bargaining agreement reached, so the contract bar doctrine is inapplicable. This leaves the issue of possible taint due to unremedied unfair labor practices ("ULPs"). CGC's theory of the case is that there was an unremedied ULP: Railserve's alleged failure to meet and bargain with the Steelworkers "with reasonable frequency." (Complaint, ¶6(b)). CGC disavowed reliance on surface bargaining or other theories. (TR 12:19-23)[1]. As shown below, under the facts of this case, Railserve did meet "with reasonable frequency." Moreover, even if it did not, such a limited infraction is an insufficient basis to find the petition tainted. Garden Ridge Management,

[1] "TR" references are to the trial transcript.

Inc., 347 NLRB at 134; LTD Ceramics, Inc., 341 NLRB at 88. The Complaint should be dismissed, and the wishes of the unit majority respected.[2]

Before turning to this case, one other matter needs be addressed. The undersigned is aware of GC16-03, which issued after the trial of this matter. Therein, General Counsel urges the Regions to plead, and then seek via the brief, that Levitz Furniture, supra, be overturned. Obviously, that theory was not pled in the instant Complaint as it predates GC16-03, so Railserve submits that due process precludes it being addressed in this case.[3] In any event, this ALJ is bound by existing Board precedent. Waco, Inc., 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed ….. It is for the Board, not the judge, to determine whether that precedent should be varied.") Based on existing law, and the facts of this case, the Complaint should be dismissed.

II. FACTS

A. Background.

Railserve provides services at a facility in Eddystone, Pennsylvania. (TR 434:12-17). It does not own the facility. (Id.) It provides services for a customer there called Eddystone Rail

[2] At trial, discussion was had about union stickers on helmets and various other matters. But the Complaint did not allege anything other than a failure to meet at "reasonable times." CGC's opening statement focused on Railserve's alleged dilatory tactics. As stated, CGC disavowed reliance on surface bargaining, regressive bargaining, etc. (TR 12:19-23). Because of this, Railserve will focus its efforts on what it understands it stands accused of: failure to meet at reasonable times (Complaint, ¶6(b)) and, consequently, that it unlawfully withdrew recognition from the Union (Complaint, ¶7). Champion Intern. Corp., 339 NLRB 672, 673 (2000); Hughes-Avicom Int'l, 322 NLRB 1064, 1065 (1997) (refusing to find that respondent violated the Act in certain ways not alleged in the Complaint); Factor Sales, Inc., 347 NLRB 747, 748 n. 7 (2006). ("It is axiomatic … that the mere presence in the record of evidence relevant to unstated accusations 'does not mean the [defending] party … had notice that the issue was being litigated'").

[3] The Complaint issued January 29, 2016. General Counsel's memo issued May 9, 2016. The Complaint was never amended, either before trial or any point during trial. The memo's issuance date is also after the trial of this matter. Certainly, due process precludes after the fact theories of the case from being asserted post-trial via a brief.

Company. (TR 434:22-23). Basically, it offloads crude oil from tank cars into storage bins. (TR 435:1-3). Eventually, the oil is pumped onto barges sailing on the Delaware River. (TR 448:1-2; TR 448:22 to TR 449:3).

The operation runs 24-7, with two 12-hour shifts. (TR 447:4-10). There are four crews, lettered A, B, C, and D. (TR 447:21-23). The crews work rotating shifts. Basically, crews get every other weekend off. (TR 475:20 to TR 478:15; TR 272:1-10). The highest management official on site is the Site Leader. (TR 446:10-16). For most of the time relevant to this dispute, that was Matt Palmer. However, in early November 2015, Palmer was replaced by Larry Williams. (TR 446:17-23). Prior to that promotion, Williams was the Assistant Site Leader – the second highest management official on site. (TR 446:24 to TR 447:3). The crews are headed up by a supervisor known as a "Crew Leader." (TR 447:13-20). It is commonplace for Crew Leaders to be promoted from the ranks. (TR 457:12 to TR 458:13). All hourly employees are "Trans Loaders." (TR 448:3 to TR 449:22). However, there are various tasks that go by different names. (Id.). For example, the person that moves the trains around is doing the task of "operator." (TR 449:9-17).

Eddystone is one of over 70 Railserve sites.[4] (TR 435:4-17). It is the only one that is (or was) unionized. (TR 435:18-20). Railserve is headquartered in Atlanta, Georgia. (TR 328:6-9). It is an associated company in the Marmon Group. (TR 434:1-3). The President of Railserve is Tim Benjamin. (TR 433:17-25). The head of Human Resources is Tim Pullen. (TR 327:20-23). Neither individual had prior experience in collective bargaining. (TR 435:22-25; TR 333:10-14).

[4] Railserve is divided into three segments. (TR 434:4-8). The largest segment is switching and transloading. (Id.). The Eddystone facility is part of that segment. (TR 434:12-21).

B. The Eddystone Facility Is Organized.

The Eddystone facility is relatively new. Railserve was the first contractor there. (TR 336:1-7). In August 2014, the Steelworkers organized a unit of employees. (Stip. Facts, ¶1). There were 28 employees in the unit. (Id.). The election was held August 29, 2014. (Id.). The vote was 16-12 in favor of the Union. (Id. ¶2). A Certification of Representatives was issued August 28, 2014. (Id., ¶3). No ULPs or objections were filed in connection with the election. Local 10-1's[5] then President, Jim Savage, would later tell Railserve representatives that the Employer ran a clean campaign. (TR 484:6-10).

C. Bargaining September 2014 to April 2015.

The Steelworkers sought a "ground rules" meeting. (Stip. Facts, ¶4). This was done via an email from a Steelworkers Staff Representative named Carl Jones, to the undersigned. (Id.). He proposed the week of September 8, 2014. (Id.). The parties would meet September 19, 2014 at the Union Hall. (Id., ¶9). Jones acknowledged that it was not unusual for the Employer to request a different week than offered by the Union. (TR 386:4-13). President Savage acknowledged that Railserve did not expect to lose, and that it would not have time in advance blocked out for negotiations. (TR 201:4-7).

The parties met as scheduled and negotiated "ground rules." (Jx-8). The rules were not a pre-printed dictate from the Employer. The rules were negotiated. (TR 387:18 to TR 388:1). The grounds rules stipulated a wage freeze, that sessions would normally be held when unit employee representatives were not working and that the next session would be a single day in

[5] Local 10-1 is the Steelworkers Local that organized the facility. Its officials would be involved in the negotiations. They would be supported by an International Representative, Carl Jones. When Carl Jones retired, his support role was to be taken over by Tom Jones, who never attended a single bargaining session. (Stip. Facts, ¶¶45, 46). Various unit employees also attended the sessions.

October. (Jx-8; TR 186:6-14). The ground rules accurately reflected what was agreed to at the meeting. (TR 211:11-13). While various Union officials testified to their "assumptions" those "assumptions" were not built into Jx-8. (TR 211:14-18).

The next session was held October 23, 2014. (Stip. Facts, ¶13). In the interim, the Union made an information request, which was complied with. (Id. ¶12).[6] The next session was held at a local hotel, close by the Eddystone facility. In fact, all bargaining sessions were held at local hotels. (TR 490:12-15; TR 382:13-16). At no time did Railserve propose that negotiations be held in Atlanta or anyplace but locally. (TR 209:24 to TR 210:2). The parties' practice was to take turns paying for the conference room. (TR 382:17 to TR 383:4).

As stated, the October 23rd meeting occurred as scheduled. In fact, Railserve never cancelled a bargaining session. The only session that was ever cancelled was in June 2015, and that session was cancelled by the Union. (Stip. Facts, ¶39). In any event, Benjamin, Pullen, Palmer and Williams attended the October session. (Stip. Facts, ¶13). Because Pullen and Benjamin had no prior bargaining experience, they also enlisted the aid of a Marmon Group resource, Gayle Schaumann. She had extensive bargaining experience. (TR 486:21 to TR 487:3). Schaumann has retired and her husband is having serious health issues. (TR 519:19-22).[7]

[6] Specifically, no charge was ever filed over this information request. There were three other information requests. (Id., ¶¶47, 53, 60). There is no Complaint allegation that these information requests were not fully and timely responded to.

[7] Schaumann did not testify at hearing. However, a party "is under no obligation to call every witness at its disposal." International Bus. Sys. Inc., 258 NLRB 181, 192 (1981). Given that she has retired, lives in Chicago and her husband is in ill health, it is not clear she was at Railserve's "disposal." Railserve further submits that her testimony was not needed in light of Pullen's, Benjamin's and Williams' testimony. Roosevelt Mem'l Med. Ctr., 348 NLRB 1016, 1022 (2006). So any attempt by CGC to argue an adverse inference should be rejected. A similar point should be made about Palmer. He is now in Casper, Wyoming, running a facility. In Roosevelt Mem'l, the Board recognized that where an employer "had already elicited testimony from two high level managers," it

No session was held in November. It is undisputed that Savage was getting married that month. (Stip. Facts, ¶14). Railserve's understanding was that it was in the Union's court to propose dates, if possible, and most likely there would not be a meeting due to the wedding. (TR 487:20 to TR 488:2). GC-11 shows that Savage sent an email 22 days after the October meeting. He apologizes for his delay. (Id.). He only offers dates in single day increments. (Id.). (See also, TR 406:15 to TR 408:17). All dates were taken by the time Savage made his proposal, but the Employer offered a December date. (TR 488:5 to TR 489:25). Other than in reference to July 2015, Jones never requested three or more days in writing. (TR 400:22 to TR 401:2).

Thereafter, the parties met in December 2014, January 2015 and March 2015. Each meeting was for a day. No Union official ever memorialized in writing any concern as to the scheduling of meetings month by month, except for Savage on February 5, 2015. (Jx-19). While agreeing to the proposed date of February 26, 2015, Savage asked for additional dates down the road. (Id.). Pullen interpreted this to be a request for dates for several months in advance. (TR 492:20 to TR 493:14). Thus, on February 17, 2015, Pullen offered single dates in March, April and May. (Jx-20). No Union official wrote back to say that Pullen missed the point, they wanted more days. (TR 403:5-18; TR 205:6-13). No Union official wrote to threaten a ULP over the pace of the meetings. (TR 399:10-18). Nor was any such ULP filed. (TR 205:1-5). This stands in stark contrast to the email at the bottom of Jx-20, and events thereafter. There, Savage threatens to file a ULP over a discharged employee. A ULP was filed over that matter, but the charge was dismissed. (TR 401:9 to TR 402:4).

"understandably chose not to call another witness to testify on the same point" when it still had to operate a business. 348 NLRB at 1022. Here, Railserve called three high-ranking officials, and the parties agree to 71 Stipulated Facts and 62 Joint Exhibits. At some point, enough needs to be enough. (TR 325:10-17).

In March 2015, the Union did broach the possibility of extra time. Benjamin acceded to that request. (TR 439:7-24). Employer witnesses did not recall the Union pushing for more dates before then. (TR 439:25 to TR 440:2). Thereafter, except in June when the Union cancelled, the parties met two days in a row. In April 2015, Union witnesses claim that Savage threatened to file a ULP over the pace of the negotiations. Company witnesses do not remember this. (TR 441:16-20; TR 453:15-18; TR 499:10-18). Credibility on this point will be discussed below. Certainly, no notes reference a "come to Jesus" moment as testified to by Jones. (TR 394:20 to TR 399:19). It is undisputed that Railserve was thinking of terminating Grosso, Sr. (the Unit President), but elected not to after discussing the matter with the Union.[8] (TR 417:3-22).

D. Bargaining May 2015 to June 2015.

In April 2015, the Savage/Minor ticket was defeated. The O'Callaghan/McGrath ticket replaced them. Pullen wrote Jones to confirm this fact and to determine what impact that would have on negotiations. (Jx-24). Jones wrote back and confirmed the defeat. (Id.). He also wrote: "We will continue to meet as we have monthly to negotiate a first labor agreement …." (Id.). Jones acknowledged that the monthly schedule, at this point, was once a month for a day and a half. (TR 410:2-8). The May meeting was held. At its conclusion, Jones offered dates in June. These dates were accepted, but the Union cancelled same, putting Railserve to time and expense. (Stip. Facts, ¶39; TR 509:9 to TR 510:6). O'Callaghan made a point of claiming that he repeatedly declared the schedule "ridiculous" at the May meeting. Despite this memorable

[8] In fact, the Employer reached a leave of absence agreement for a unit employee with the Union. (TR 397:13-18; 398:6-11). The Employer was also always religious about reaching out to the Union before terminating or disciplining employees. (TR 416:12-22). The Union would bring these issues up at meetings. (TR 501:14 to 503:1). This makes sense as all Union witnesses agreed that a termination is an important event to the Steelworkers. (TR 277:5-24; TR 415:22 to TR 416:10).

phrase and his rather intense style of delivery, it appears in no bargaining notes. (TR 103:9 to TR 104:15).

E. Bargaining July 2015 to October 2015.

Jones did email Pullen and ask for "three dates for July." (Jx-27). Pullen believed that Jones was simply trying to make up for the cancelled June meeting. Believing that the parties' agreed-upon schedule was simply once a month for a day and a half, that is what he proposed. (TR 507:12 to TR 508:1). Jones did not object, and the parties met July 21st and 22nd. Id. This represented pushing the original schedule back one day (i.e., from the 20th and 21st to the 21st and 22nd). (Stip. Facts, ¶43). This was done to better accommodate some people's schedule. (TR 506:7-20). The meeting went forward despite Benjamin's inability to attend.[9] It was the only time Railserve moved a date once it was set. Railserve never cancelled a meeting.

The July meeting began well, despite Benjamin's absence. A number of tentative agreements were signed off on. (Jx-36). At the conclusion, after Pullen had left, O'Callaghan made his belief clear that the parties were not meeting enough. Unlike supposed outbursts by Savage, Jones or Minor – this was remembered by Railserve personnel. (TR 435:19 to TR 455:17). He also made some information requests. (Stip. Facts, ¶47). There is no Complaint allegation that these were not lawfully responded to. While his information requests were in writing, his request for more dates was not. (TR 75:18 to TR 76:11).

When starting to respond to O'Callaghan's information requests, Pullen also offered August dates. (Jx-38). He also inquired why more dates might be needed. (Id.). He offered Railserve's take on why the current system was working. (Id.; TR 511:12 to TR 512:4). Pullen

[9] Of course, Tom Jones (Carl Jones' replacement) never attended a meeting. (Stip. Facts, ¶46). Savage also missed a number of meetings while Minor pinched hit. (Stip. Facts, ¶¶19, 28, 29).

followed up with an email a few days later re-offering the August dates. (Jx-39, page 2). O'Callaghan simply accepted the dates (Id., page 2) and did not take issue with the points Pullen made in Jx-38. (TR 100:21 to TR 101:2).

The parties did meet in August. More tentative agreements were signed. (Jx-44). (Id.). O'Callaghan was unhappy with the Employer's information response. He threatened to file a ULP over same. He made no such threat as to the pace of negotiations. (TR 514:5-20; TR 455:21 to TR 457:9). Again, there is no Complaint allegation that Railserve's actual information responses were deficient.

The parties met in September and October. More progress was made with additional tentative agreements signed. (Jx-49). Another information request was made (Stip. Facts, ¶60) and properly responded to as there is no Complaint allegation regarding same. October was the last month when the last meeting was held. By then, 18 tentative agreements had been reached. (Stip. Facts, bottom of p. 16). As to open items, all had been discussed (TR 87:8-11), although item 20 of the open items (Id.) had never been formally proposed. (TR 77:25 to TR 78:5). Not listed as an open item was the Union's proposal for card check at other sites, a topic they concede is a non-mandatory topic of bargaining. (TR 393:12 to TR 394:13). It was never withdrawn.

F. Changes At The Facility, And Employees Sign A Decertification Petition.

Site Leader Palmer was not popular. (TR 418:4-17). The Union routinely made this clear. (TR 498:18-23). Site Leader Palmer was transferred to Casper, Wyoming, effective November 9, 2015. (TR 519:24 to TR 520:1; TR 446:17-23). Assistant Site Leader Williams replaced Palmer. (TR 446:17-21).

Thereafter, a Crew Leader position came open. As was practice, the opening was posted. (TR 457:12 to TR 458:13). It was posted until November 13, 2015. (TR 458:16 to TR 459:4). Of the 31 employees, 16 applied for the position. (TR 459:5-6). Amongst these was Grosso, Sr., who had recently resigned as Unit Chair. (Stip. Facts, ¶8). His designated replacement, David Bennett, also applied. (Stip. Facts, ¶66). The second highest Union official on site (Larry McFadden) also applied. (TR 73:18 to TR 74:21; TR 461:22 to TR 463:2). Due to the large number of applicants, Williams posted an interview schedule. (TR 468:10 to TR 469:13). Grosso, Sr. was selected for the position.[10] (TR 460:3-6).

After the posting of Crew Leader interview schedule, a decertification petition began to circulate. At this time, there were 31 unit employees. (Stip. Facts, ¶67). Of these, 19 unit employees signed the petition. (Id.). That is over 60% of the unit. All signatures were obtained between November 17, and November 20, 2015. (Id.). The petition clearly requested that if "the undersigned employees make up 50% or more of the bargaining unit … the undersigned employees hereby request that Railserve, Inc. withdrawn recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit." (Id.; Jx-58, p. 2).

The petition was presented on November 20, 2015. (Stip. Facts, ¶67). Recognition was withdrawn by Railserve that same day. (Id., ¶68). Subsequently, a petition containing additional signatures was received, which was provided to the Union. (Stip. Facts, ¶71). There is no evidence that any signing employee ever rescinded his signature or otherwise indicated support

[10] There is no Complaint allegation that the selection of Grosso was unlawful or indeed that any portion of the Crew Leader selection process was unlawful. While CGC expressed some concern that Grosso's selection was somehow surprising, there was no such allegation in any version of the Charge, must less the Complaint. In any event, both Pullen and Williams testified why prior run-ins did not disqualify Grosso and why he was the best candidate. (TR 460:19 to TR 461:11; TR 517:6-18). It should also be noted that Grosso and Williams are friends. (TR 461:12-16).

for the Steelworkers on or after November 20, 2015. No unit employee testified at hearing that they rescinded their signature (much less enough to bring the number of signatures to below 50%).

G. Procedural History.

A charge containing various allegations was filed on October 6, 2015. (Complaint, ¶1(a)). An amended charge containing slightly different allegations was filed November 24, 2015. (Id., ¶1(b)). The final amended charge was filed on January 21, 2016. It only contained the two allegations found in the Complaint: that (a) Railserve had failed to bargain with "reasonable frequency" and (b) that Railserve had unlawfully withdrew recognition from the Union on November 20, 2015. (Id., ¶¶1(c), 6(b), and 7). A Complaint issued and a timely Answer was filed. The Complaint was not amended before, or during, trial. See, fn.3.

III. ARGUMENT

A. PARAGRAPH 6(b) OF THE COMPLAINT SHOULD BE DISMISSED. THERE IS NO PER SE RULE REGARDING THE NUMBER AND TIMING OF MEETINGS. THE PARTIES MET ON A SCHEDULE ACCEPTABLE TO THEM.

The Complaint and CGC's theory of the case are relatively straight forward. Both assert Railserve refused to meet with "reasonable frequency." In sum, CGC argues that the parties, with two exceptions,[11] met once a month from September 2014 until October 2015, so the case is open and shut. CGC's theory is wrong. The Act does impose an obligation to meet at reasonable times for reasonable periods. However, the Board has not developed a hard and fast rule with regard to the number, frequency and duration of meetings. Radiator Specialty Corp., 143 NLRB 350, 368 (1963); CSC Holdings, LLC, JD (NY)-47-14 (Case 02-CA-085811) at

[11] The parties did not meet in June 2015, because the Union cancelled the session. (TR 505:20-22). As will be discussed, the lack of a meeting in November 2014 can largely be placed at the Union's doorstep as well.

pages 211-14 (ALJ Fish, December 4, 2014); Modjeska and Modjeska, NLRB Practice, at pages 1034-35 (Thomas Reuters, August 2015). Indeed, a pattern of bargaining similar to the instant case has been found lawful in the past. CSC Holdings, supra; Charles Mfg. Co., 245 NLRB 39, 41-42 (1979); Charles E. Honaker, 147 NLRB 1184, 1185-86 (1964).

1. July 2015 Is The Earliest The Union Sought More Meetings.

First, the ALJ should reject any testimony that the Union pushed for more meetings prior to July 2015.[12] It is clear that the Union asked for a ground rules meeting. (Jx-3). They agreed to one day in October at that meeting. (Jx-8, ¶4; TR 168:6-14). It is clear that at the end of November 2014, the ball was in the Union's court to propose dates. Savage's apology in GC-11 makes no sense if it was not his responsibility to offer dates, and even then, they were offered in one day increments. (Id.).

The testimony of Savage, Minor and Carl Jones that they were pushing for more dates should not be believed. While they claim that they threatened ULP charges, no such charge was filed. Nor, was any such threat put into writing. Interestingly, the Union knew how to put threats of charges in writing. (Jx-20). And, indeed, they filed a charge, which was dismissed. (TR 401:9 to 402:4). It boggles the mind that they would file a charge over a man sleeping on the job, but not over the pace of negotiations, if it was truly bothering them. Savage, Minor and Jones testified about a blow-up in April 2015. Interestingly, Minor does not mention this blow-up in her statement given to CGC. (TR 274:6 to TR 275:15). Given Jones' description of the event, it seems incredible that she would just leave it out. Even more incredible is that it is not documented in the Union's extensive bargaining notes of that day. (TR 396:17 to TR

[12] The one exception being March 2015. They asked for more days and Railserve proposed they begin meeting two days in a row, which was the pattern thereafter. Thus, it cannot be said that Railserve refused to bargain more days, as time was added beginning in April 2015.

398:8). This, despite the fact that CGC repeatedly stressed, via Union witnesses, of the Steelworkers insistence on accurate bargaining notes. (TR 42:16-21; TR 75:11-17; TR 412:21 to TR 413:10). None of the Company witnesses recall Savage being upset about the pace of negotiations, although they could recall other instances of his ire. (TR 464:15 to TR 466:2). Significantly, there is little or no evidence of a Union push for more dates in the bargaining notes prior to July 2015. Given the emphasis the Union puts on bargaining notes, this is a damning omission.

Perhaps the two most damning emails are Jx-19 and Jx-20. In Jx-19, Savage asks for dates down the road. In Jx-20, Pullen responds with one day a month for the next three months. Presumably this would have been the idle time for Savage or Jones to put Pullen on notice, in writing, that he did not get it: they wanted more days or meetings per month. But they did not. They simply agreed to his proposed schedule. Railserve's point is not that the law requires that demands be put into writing. Railserve's point is that the lack of a paper trail fatally undermines that any requests were being made. Again, it was CGC's witnesses who raised the taking of detailed bargaining notes via the "scribe" to a near mythical standards – but the use of email in 2015 to achieve the same goal, somehow escapes them. That makes no sense.

Equally devastating is Jx-24. There, Jones confirms Minor's and Savage's loss. (Id.). He then points out that "[w]e will continue to meet as we have monthly …". (Id., at bottom of page 2) (emphasis added). At this point, the schedule was once a month for a day and a half. Clearly, an experienced negotiator like Jones would have put his concerns as to the pace of negotiations into writing at this point, if he were truly concerned about said pace. While O'Callaghan repeatedly claimed that he called the pace of negotiation "ridiculous" in May, this is not borne out by the recollections of the Company witnesses. (TR 505:10-19). Likewise, it is

not in the bargaining notes. (TR 103:9 to TR 104:15). In fact, it was Jones that proposed the June dates – dates that the Union later cancelled. (TR 505:4-9). Despite McGrath's availability, and their supposed pressing need for meetings, they did not send him. (TR 42:9-14).

Significantly, the first documented outburst by the Union is July 2015. For some reason, O'Callaghan chose the one meeting Benjamin was not at, and that Pullen had left, to make his anger clear. Notably, Pullen did not simply ignore the matter. He offered August dates, but inquired as to why O'Callaghan wanted more time. (Jx-38). He correctly noted that the parties had signed off on a large number of tentative agreements and that Railserve had put out holiday and vacation proposals. (Id.). O'Callaghan's only response was to accept the dates offered. (Jx-39). Again, Union witnesses repeatedly stressed how important a "scribe" is – the need to document things for posterity. Yet when given the opportunity to lay out the Union's case in a few lines, he did not. Again, this is not an argument that demands for sessions must be in writing. Rather, it is an observation that if the Union were truly upset, the logical thing to do is to lay a paper trail. Especially in light of Pullen's cogent point why the system was working. It is clear that prior to July 2015, there was no constant demand for more dates or times. As we will see, in August it appeared that July was but a tempest in a teapot.

2. August – October.

At the August meeting, O'Callaghan seemed much calmer. While he threatened ULPs, he did so with respect to his demands for certain information requests. (TR 514:5-20; TR 455:21 to TR 457:9). Thus, Railserve thought the matter concerning meetings was over. It is true that in September, October and November, O'Callaghan again seemed to push for more days. But he never protested or demanded more days. Indeed, in November, he chose the latter of two sets of dates offered by Pullen. (Stip. Facts, ¶¶67, 69). In sum, the Complaint alleges that from April

2015, Railserve refused to meet with reasonable frequency. This claim is not supported by the documentary record, and indeed is rebutted by it.[13]

3. Railserve Did Not Waste Time.

A theme of CGC was that Railserve wasted time at the table. First, there was Zubrzycki's claim that Railserve would waste time talking about sports. This was revealed as a sham on cross-examination. (TR 314:24 to TR 316:24). Even Jones conceded little time was spent talking about sports. This was the uniform recollection of Railserve witnesses. Of course, McGrath also overstated things by constantly testifying that meetings ended before the times stipulated. (TR 155:9 to TR 158:20). This gilding of the lily should not be overlooked by this ALJ. There are no reasons for such tall tales if the Union's case were this simple slam dunk as constantly implied by CGC.

Likewise, the parties did talk about bargaining matters that did not directly pertain to the contract. Usually, this dealt with discharge matters, surely a matter of import to the Union. (TR 415:22 to TR 416:10). It is how they saved Gross, Sr.'s job. Likewise, the Union was just as prone to bring such matters up as Railserve. (TR 501:14 to TR 503:17). The parties met on a schedule amenable to both. What they talked about was amenable to both. To blame Railserve is simply unfair.[14] Paragraph 6(b) should be dismissed.

[13] At best, O'Callaghan's emails, beginning in September, might reflect a concerted request for more dates. But they were never ignored. O'Callaghan simply did not take Pullen up on his offer to explain his reasoning. But September, not April as alleged, is the earliest a failure to bargain can fairly be supported by the evidence. And even that is a stretch.

[14] Why was the Union amenable? Savage was embroiled in national negotiations. Jones was nearing retirement. Railserve was far smaller and less important of a unit than Philadelphia Energy Solutions (for whom the Union cancelled the June session.) (TR 91:21 to TR 92:3).

B. PARAGRAPH 7 OF THE COMPLAINT SHOULD BE DISMISSED. RAILSERVE WAS PRIVILEGED TO WITHDRAW RECOGNITION. NO ULP HAS BEEN PROVEN. ALTERNATIVELY, ANY PROVEN ULP DID NOT TAINT THE PETITION.

1. The Petition Privileged The Withdrawal Of Recognition.

The "core principle" of the Act is "that a majority of employees should be free to accept or reject union representation." Conair Corp. v. NLRB, 721 F.2d 1355, 1380-81 (D.C. Cir. 1983). In November 2015, a "majority of employees" chose to reject continued representation by the Steelworkers. (Stip. Facts, ¶67). Their choice should be respected, if the "core principle" of the Act is to be effectuated. Thus, the Steelworkers were certified August 28, 2014. Their certification year ran August 28, 2015. In mid-November 2015, (almost 3 months after the certification year had run), unit employees exercised their Section 7 right to circulate a petition requesting Railserve to withdraw recognition.[15] (Stip. Facts, ¶67). Railserve did so. (Id., ¶68). Absent a "legal barrier," Railserve's conduct was privileged. Lexus of Concord, 343 NLRB at 852; Levitz Furniture, 333 NLRB at 724. Indeed, it would have been a violation of the Act for Railserve to have continued to bargain upon receipt of the petition. DuraArt Stone, Inc., 346 NLRB 149 fn. 2 (2005).

No "legal barrier" condemns Railserve's action. There was no contract bar in place. Likewise, effective August 29, 2015, the Union's certification year had run. Hartz Mountain, 295 NLRB at 426. At this point, the Union's presumption of majority status became rebuttable. Station KKHI, 284 NLRB 1339, 1340 fn. 3 and 4 (1987). The petition (Stip. Facts, ¶67, Jx-58)

[15] There is no Complaint allegation that Railserve supervisors were in any way involved in the petition or in the obtaining of signatures. The ALJ properly shut down CGC's attempt to interject any such evidence into the case. TR 69:21 to TR 70:17. Railserve further notes that in the initial charge filed October 7, 2015, there were some vague allegations of supervisory taint. But these allegations were not included in the second amended charge filed January 21, 2016. The allegations in the second amended charge, mirror the only allegations in the Complaint: (a) that Railserve did not bargain with reasonable frequency and (b) that it improperly withdrew recognition. No other matter is or was properly litigated before the ALJ. See, fn. 2 above.

signed by a majority of the employees establishes that the Union had lost majority support. Shaw's Supermarket, 350 NLRB at 588. Thus, per Levitz and DuraArt, Railserve's conduct was not only lawful, but mandated. CGC urges that the withdrawal was tainted by an alleged ULP. As discussed above, no ULP has been proven. Thus, ¶7 should be dismissed. The Core Section 7 right of unit employees to reject union representation should be respected.

2. Assuming A ULP Was Proven, CGC Did Not Establish A Causal Link Between The Alleged ULP And Any Loss Of Support.

As stated, no ULP has been proven. But assuming that it has been proven that Railserve did not bargain with reasonable frequency, this does not automatically mean that the withdrawal of recognition was unlawful. The Board has routinely found that a decertification petition was not tainted (i.e., the withdrawal of recognition was lawful) despite the presence of one or more ULPs. Garden Ridge Management, Inc., 347 NLRB at 134; LTD Ceramics, 341 NLRB at 88; Howe K. Sipes Co., 319 NLRB 30, 40 (1995); Airport Aviation Servs., Inc., 292 NLRB 823, 824 (1989); Bunting Bearings Corp., 343 NLRB 479, 483 fn. 17 (2004) (no taint despite ALJ finding 3 violations and Board finding additional violation on appeal). Rather, the CGC must prove that there is a causal link between the proven ULP and the dissatisfaction. Vanguard Fire & Supply Co., Inc., 345 NLRB 1016, 1044 (2006). CGC has not met its burden.

Initially, it should be noted that in cases of supervisory taint, the Board will assume a causal relationship. The Sheraton Anchorage, 362 NLRB No. 123 (2015) at fn. 2. However, there is no allegation or supervisory taint in this case. Moreover, the Board draws a distinction between a flat refusal to bargain and "lesser Section 8(a)(5) violations." LTD Ceramics, 341 NLRB at 89. Obviously, there has been no flat refusal to bargain in this case. Railserve met with the Union every month the Union was available. Railserve never cancelled a bargaining session. The parties reached agreement on at least 18 issues. (Stip. Facts, page 16). There was

no outstanding topic that was not discussed. (TR 87:8-11). Indeed, Garden Ridge Management would make no sense if a proven failure to meet did meet with reasonable frequency automatically tainted a petition. 347 NLRB at 134.

The standard applicable in this case was annunciated in Master Slack Corp., 271 NLRB 78 (1984). Those standards are not met in the instant case. In determining whether Master Slack standards have been met, the Board (and the Courts) put heavy emphasis on the existence (or lack thereof) of "hallmark" violations. Tenneco Automotive, Inc. v. NLRB, 716 F.3d 640, 649-50 (D.C. Cir. 2013) (citing cases). Compare, Ardsley Bus Corp., 357 NLRB 1009, 1013 (2011) (discussing plethora of hallmark violations in finding taint, including direct dealing, physical and verbal assault on shop steward, suspension of union adherent, flat refusal to attend grievance meetings). No such "hallmark" violations exist in this case. There is no allegation that Railserve fired or suspended union supporters. There is no allegation of surface bargaining or regressive bargaining. There is no allegation of direct dealing or of threats or unlawful promises.

This is a case with, at best, a solitary violation. Much of the delay is the Union's own fault. They requested a grounds rule meeting. They agreed to one day of bargaining in October. They delayed coming up with dates in November (GC-11) and then offered only days in single day increments. (Id.) They did not push for more days of bargaining until July 2015 (and then only after cancelling the June session). See, discussion above at pages 14-16. They then let the matter drop in August. (Id. at 16). They did not send out status reports to their members. They insisted on keeping a non-mandatory topic of bargaining alive into October 2015. Despite 15 months of bargaining, they never even put a successorship proposal on the table.

Certainly, Railserve did many things that were the polar opposite of undercutting the Union. They reached 18 tentative agreements. They decided not to fire the Unit President

(Grosso, Sr.). They responded in a timely and full manner to 4 information requests.[16] The parties settled pay grievances and a leave of absence for one employee. Railserve always contacted the Union before taking disciplinary action. They did nothing to diminish the Union in the eye of the membership that the Union did not do to itself.

3. The Evidence Disproves Any Causal Supposed Link.

There is significant evidence that the Union's loss of support is unrelated to any alleged ULP by Railserve. First, the earliest any ULP should be found is September 2015. See, fn. 13 above. However, the Steelworkers acknowledge that there was unhappiness with the pace of negotiations by July, 2015, before O'Callaghan's outburst with Schaumann. (TR 88:15-24). If the pace of negotiations was the cause of their downfall, then the Union has no one to blame but themselves. Moreover, they compounded their problem by making promises in July that they did not keep: they did not (ever) put up a "rat" and they inexplicably delayed filing a charge.[17] (TR 88:15-24). Certainly, any politician, salesman or private sector lawyer can tell you, the quickest way to lose a voter, a customer or a client, is to make promises you do not keep.

Moreover, the timing of the petition and the signatures therein, is at war with a conclusion that the unit members' dissatisfaction was caused by the pace of negotiations. Thus, all of the signatures were obtained during a three-day window in November, 2015. (Stip. Facts, ¶67). It boggles the mind to believe that suddenly, out of the blue, during a three-day window in November, the employees decided to decertify the Union because of the slow pace of the

[16] The Stipulated Facts refer to four information requests. There is no Complaint allegation that Railserve's responses were anything but full and timely.

[17] Certainly, waiting until October 2015 (Complaint, ¶1(a)) is entirely incompatible with the concept that the Union believed Railserve had been foot dragging since September 2014. It is equally incompatible with a claim that threats to file a charge were made in April of 2015 by Savage or that O'Callaghan believed that the entire schedule was "ridiculous" in May 2015. In other words, the timing of the charge is inexplicable, not the timing of the decertification petition.

negotiations. A slow pace that the CGC asserts had been going on since September 2014 (albeit with no charge being filed until October 2015).

Rather, the record points to a lawful reason why the employees decertified. First, the vote was 16-12. (Stip. Facts, ¶2). Thus, there was always a 40% contingent that did not want representation.[18] Second, Palmer was replaced by Williams. The Union repeatedly criticized Palmer, who was unpopular. (TR 418:4-17). It stands to reason that the unit members might wish to give Williams a chance. Third, there was the Crew Leader selection process, which was not alleged at any point as being unlawful.

Crew Leaders are supervisors. Railserve, as was its practice, posted a notice for a Crew Leader position. Approximately 16 of the 31 employees applied, far more than had applied in the past. Williams posted an interview schedule. (Emp. Ex. 1). Amongst those applying were Grosso, Sr. (the former Unit Chair), Bennett (the newly designated Unit Chair) (Stip. Facts, ¶66) and McFadden (the second highest Union official on site). (TR 461:22 to TR 463:2). It is hardly a stretch that when employees saw Union officials seeking a supervisory slot (i.e., giving Williams a chance) that they chose to do likewise by signing a petition to decertify. The timing of the decertification is best explained by leading Union officials' decision to seek jobs outside the unit (along with Palmer's transfer) than by some alleged unhappiness with the pace of negotiations.[19]

[18] Obviously, there had been turnover. But the Board assumes new hires support the Union in the same percentages as initially. In this case, this would mean 40% of employees were never union supporters to begin with.

[19] And as explained, if there was unhappiness in July 2015 over that pace, then the Union has no one to blame but themselves for that state of affairs. A problem they exacerbated by making promises they did not keep.

IV. CONCLUSION

Wherefore, for all the foregoing reasons, this ALJ should rule in Railserve's favor. Absent a ULP, Railserve was clearly privileged, under existing law, to withdraw recognition. Levitz Furniture, 333 NLRB at 724. It is undisputed that 19 of 31 employees signed a petition requesting that Railserve withdraw recognition. (Stip. Facts. ¶67). No ULP should be found. The parties met on a bargaining schedule amenable to both. The Union's claims that, virtually from the inception of bargaining, they were clamoring for more meetings, does not pass muster. The claim is not credible and at war with the documentary evidence. Parties can, and do, meet on such a schedule. Charles E. Honaker, 147 NLRB at 1185-86; Boaz Carpet, 280 NLRB 40, 43 (1986).

Assuming a technical Section 8(a)(5) violation occurred, it is not a sufficient basis to overturn the express wish of over 60% of the unit that recognition be withdrawn. NLRB v. B.A. Mullican Lumber and Mfg. Co., 535 F.3d 271, 282 (4th Cir. 2008) ("[T]he Board must be guided by the Act's mandate to give effect to employee's choice, whether it is the choice to be represented by a union, or not") (emphasis in original); Garden Ridge Management, Inc., 347 NLRB at 134. The Complaint should be dismissed, in its entirety. Certainly, the majority wish of the unit not to be represented should be respected. (Stip. Facts, ¶67).

Respectfully submitted,

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